SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 70

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF THEREON.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 991

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of the American Federation of Labor, International Longshoremen's Association, and Pacific Coast District International Longshoremen's Association No. 38, all unincorporated associations and labor organizations, by their attorney, Joseph A. Padway, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Co-

lumbia, entered in the above entitled cause on February 27, 1939, dismissing petitioner's petition for review of an order of the National Labor Relations Board dated June 21, 1938.

Statement of the Case.

This was a petition for review filed in the United States Court of Appeals for the District of Columbia under Section 10(f) of the National Labor Relations Act, in which petitioners sought to review and set aside an order of the National Labor Relations Board certifying the International Longshoremen's and Warehousemen's Union, a labor organization affiliated with the Congress for Industrial Organization, as the exclusive bargaining representative for all the longshore employees on the West Coast of the United States. The petitioners were three labor organizations—the Pacific Coast District International Longshoremen's Association No. 38, the International Longshoremen's Association, with which Association No. 38 is affiliated, and the American Federation of Labor, with which both are affiliated. Members of the International Longshoremen's Association are engaged in longshore work on the Pacific Coast and in other portions of the country, and the International Longshoremen's Association had for many years prior to the decision of the Board represented thousands of longshore employees on the Pacific Coast and had set up and maintained many locals in all of the principal West Coast ports.

The respondent, National Labor Relations Board, is a Governmental agency organized under an Act of Congress known as the National Labor Relations Act, 49 Stat. 449.

A dispute having arisen between the International Longshoremen's and Warehousemen's Union, (hereinafter termed the CIO) and the petitioners herein, concerning representation of longshore employees on the West Coast, the CIO petitioned the Board to certify it as exclusive bargain-

ing agent for all longshore employees on the West Coast. Petitioners in their answer denied the Board's power to prescribe a unit larger than the employees of individual employers. After lengthy hearings before the Board at which both parties were represented and many witnesses examined, the Board, on June 21, 1938, made elaborate findings of fact and conclusions of law, and issued its decision and order of certification (see R. 6-58), certifying the CIO as the *exclusive* bargaining agent of all employees of all longshore employers operating in Pacific Coast ports from Canada to Mexico. These employers, of which there were some 200, thereupon entered into a collective bargaining contract with the CIO, through an employer association, in which the CIO was recognized as the exclusive bargaining representative of all West Coast longshore employees, and its members given a preferential employment status.

A petition objecting and excepting to the decision of the Board and asking for a rehearing filed by the petitioners on August 15, 1938, was denied by the Board on August 27, 1938 (see R. 59 & R. 61).

The petitioners then sought to appeal to the United States Court of Appeals for the District of Columbia under Section 10(f) of the National Labor Relations Act as a "person aggrieved by a final order of the Board" (see R. 1-5 & 62). The petition for review alleged generally that the order of certification was contrary to law in that the Act did not give the Board power to prescribe a unit larger than that composing the employees of individual employers, and that as a result of the decision and order of certification, petitioners, although selected by a majority of the employees of a large number of individual employers, and functioning as collective bargaining representative for thousands of longshoremen on the West Coast, were nevertheless unlawfully deprived of their status as collective bargaining agents and were unlawfully deprived of their right to represent long-

shore employees and to engage in business as labor organizations on the entire West Coast of the United States; their membership was being destroyed; their locals were being disrupted; and investments of many thousands of dollars in organizing expenditures, strike and welfare benefits, and maintenance payments made through the years were being lost; and that petitioners were thereby aggrieved by the decision and order of the Board. The respondent, National Labor Relations Board, filed a so-called special appearance objecting to the jurisdiction of the United States Court of Appeals for the District of Columbia to hear the appeal and moved to dismiss the appeal (R. 64). Briefs were filed by both parties and the case was argued December, 1938. On February 27, 1939, the court handed down its decision dismissing petitioners' petition in which it held that the order was not a "final order" within the terms of the Act (see R. 69). In so holding the court freely conceded that, with respect to petitioners, the order was "definitive, adversary, binding, final and in this case struck at the very roots of petitioners' union and destroyed its effectiveness in a large geographical area of the Nation", but felt itself bound to find that the order, not being made in the language of a command, but merely certifying a rival union as exclusive bargaining agent, and hence being in the nature of a "negative order", was not a final order by reason of the decisions of this Court in *Shannahan* v. *United States*, 303 U. S. 596, and in *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 117. These decisions were found by the Circuit Court to hold that: "* * * a 'determination' or 'decision' by an administrative body may be definitive, may be legal, and may be binding as to all parties concerned, but it is still not an 'order' if it does not also command or direct a particular thing to be done". Subsequent to the date of that decision this Court in the case of *Rochester Telephone Corporation* v. *The United States of America and Federal Communications*

Commission, 83 L. Ed. (adv. sheets) 719, decided April 17, 1939, re-examined in its entirety the law relating to appealable orders of administrative bodies and rejected the doctrine of "negative orders". On the 15th day of May, 1939, the Circuit Court of Appeals for the Sixth Circuit in a case entitled *Libbey-Owens-Ford Glass Company, Petitioners*, v. *National Labor Relations Board*, refused to dismiss an appeal from an order of certification in a situation similar to the present one.

Thereupon on the 20th day of May, 1939, petitioners applied to the United States Court of Appeals for the District of Columbia for permission to file a petition for rehearing, which petition was denied on the 24th day of May, 1939, for the sole reason that the term of court in which the decision was made having expired April 1, 1939, the Circuit Court was without jurisdiction to entertain a petition for rehearing (see R. 75).

The single issue on this appeal is whether the order of the Board certifying the CIO as the exclusive bargaining agent for all West Coast longshore employees is a final and reviewable order.

Reasons for Allowance of the Writ.

The grounds relied on by the petitioners for the allowance of the writ are:

1. The decision of the Court of Appeals for the District of Columbia is contrary to the provisions of the National Labor Relations Act, particularly Section 10(f) thereof;[1]

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[1] Sec. 10 (f) of the N. L. R. A., so far as relevant, reads as follows:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside."

2. The decision is in conflict with the decision of this Honorable Court in the case of *Rochester Telephone Corporation* v. *The United States of America et al.*, 83 L. Ed. (adv. sheets) 719.

3. The decision is predicated on an erroneous conception by the court below of the holding of this Court in the cases of *Shannahan* v. *United States*, 303 U. S. 596, and *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 177.

4. The decision is in conflict with a decision on the same matter involving the identical issue decided by the Circuit Court of Appeals for the Sixth Circuit in the case entitled *Libbey-Owens-Ford Glass Company* v. *N. L. R. B.*, decided May 20, 1939.

5. The case involves in its essential features the rights of labor organizations to appeal from decisions of the National Labor Relations Board prescribing appropriate bargaining units which it is alleged are prescribed contrary to the power conferred on the Board by the Act, which decisions certify rival labor organizations as exclusive bargaining agents thus depriving said labor organizations of the right to represent employees and otherwise to carry on their business as labor organizations in various localities, and depriving them of various property rights. A decision on this question is of vital importance to all labor organizations throughout the country, such orders involving as they do in many cases an abrogation of the very existence of labor unions.

Prayer.

WHEREFORE your petitioners respectfully pray that writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify to and send to this Court for its review and determi-

nation, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, April Term, 1938, No. 7257, American Federation of Labor, International Longshoremen's Association, and Pacific Coast District International Longshoremen's Association No. 38, petitioners, *vs.* National Labor Relations Board, respondent, and that the judgment and decree of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioners will ever pray.

AMERICAN FEDERATION OF LABOR,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38,
By JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 991

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION NO. 38,

Petitioners,

vs

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court.

The opinion of the United States Court of Appeals for the District of Columbia, filed on February 27, 1939, is printed in the record filed herein at R. 69-75.

Jurisdiction.

1. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended. The date of the judgment of the United States Court of Appeals to be reviewed is February 27, 1939.

2. This case devolves upon an interpretation of the National Labor Relations Act.

3. The decision of the United States Court of Appeals is in direct conflict with applicable decisions of your Honorable Court and a decision on the same matter decided by another Circuit Court of Appeals.

Statement of the Case.

The foregoing petition for writ of certiorari contains a concise statement of the case and in the interest of brevity such statement will not be repeated here.

Specification of Error.

1. The United States Court of Appeals for the District of Columbia erred in dismissing petitioners' petition to review and set aside an order of the National Labor Relations Board on the ground that although the said order was final, adversary, binding, definitive, and destructive of petitioners' property rights, it was not a "final" order because it was not made in the language of a command and did not command or direct a particular thing to be done, and in relying on the opinions of this Court in the *Shannahan* v. *U. S.*, (303 U. S. 596), and *Shields* v. *Utah Idaho Central R. R. Co.* (305 U. S. 177), cases in support of said determination.

2. The decision of the court below is contrary to the decision of this Court in *Rochester Telephone Corporation* v. *The United States of America et al.*, 83 L. Ed. (adv. sheets) 719, in which the doctrine of "negative orders" was rejected and in which it was held that the substance rather than the form of the order sought to be renewed was the determining factor.

3. The decision of the court below is contrary to a decision of the Circuit Court of Appeals for the Sixth Circuit permitting an appeal in a case similar to the present case.

ARGUMENT.

A. The Order of Certification is Definitive, Adversary, Binding and Final.

It will accomplish no good to argue at length that the present order [2] is at least in substance and effect a final, definitive order. The lower court so held, and the following portions of the decision are quoted in connection with this point:

> "• • • Enough has been said to show that we have here a controversy between two national labor organizations, both of which have appealed to the Board to resolve their conflicting rights and the rights of their members, and one of which claims that the unlawful action of the Board in the designation of an employer unit beyond the terms of the Act has destroyed its property rights and the property rights of its members and that, unless it can obtain a review by appeal to this Court or some other Circuit Court of Appeals, it will be wholly without redress of any kind.
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> "The Supreme Court has held in a number of cases that mere preliminary or procedural orders of an ad-

[2] The Board's Order of Certification together with the conclusions of law on which it is based are as follows:

Conclusions of Law.

1. A question affecting commerce has arisen concerning the representation of longshoremen in the Pacific Coast ports of the United States, within the meaning of Section 9(c) and Section 2(6) and (7) of the National Labor Relations Act.

2. The workers who do the longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners' Association of the Pacific Coast, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the National Labor Relations Act.

3. International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all the workers in such unit for

ministrative body are not reviewable by the Circuit Court of Appeals, and this brings us to our starting point, namely, whether what happened here was in effect a final order commanding or directing something to be done. In the case of *Mallory Coal Company* v. *National Bituminous Coal Commission*, 99 F. (2d) 339, we endeavored to review this question in the light of the decisions of the Supreme Court and to lay down a test as a guide to ourselves in determining the question. We said:

'Underlying all these tests of appellate jurisdiction is the fundamental requirement that the person seeking review must first have exhausted his administrative remedy. If the order in the particular case is definitive rather than preliminary or procedural; if the order operates particularly upon the person seeking review; rather than upon the world generally or upon a large group of interested persons; if the order was entered in a proceeding, adversary in character, after notice given, with a hearing at which witnesses were examined and points of law argued, and in which findings of fact were made; if a petition for rehearing

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the purposes of collective bargaining, within the meaning of Section 9(a) of the National Labor Relations Act.

Certification of Representative.

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9(c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended,

It Is Hereby Certified that International Longshoremen's and Warehousemen's Union, District No. 1, has been designed and selected by a majority of the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners' Association of the Pacific Coast, as their representative for the purposes of collective bargaining, and that, pursuant to the provisions of Section 9(a) of the Act, International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all such workers for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment and other conditions of employment.

was filed urging, upon the Commission, the objection to the order now urged for the consideration of the courts; each of these circumstances—and more particularly all of them together—may indicate that the administrative remedy has been exhausted and that it is time for judicial review. Until that time comes, the matter should remain in the control of the administrative agency.'

Examined in the light of this formula, the decision of the Board in the case in hand contains all the elements we believed to be necessary to make it reviewable under the statute. The proceeding out of which it emerged was neither preliminary nor incident to another proceeding. It concerned a controversy affecting the vital interests of two rival unions. It was begun and concluded for the purpose of settling the dispute. It was authorized by the statute to be made and so far as concerned the unions it was final. Its actual effect was to eject petitioner from the controversy. The suggestion that petitioner might have induced the employer to reject the finding and subject himself to an unfair labor proceeding and thus secure a court review, is wholly beyond the point. Petitioner had no control of the employer, and here the petition shows that the employer, acting within the spirit as well as the letter of the Act, promptly obeyed the Board's decision and entered into a contract in accordance with its terms. So that what happened was precisely what in a proper case the Act designed should happen—but, as we have seen, with the result that petitioner, in the localities in which its members constituted a majority, was—if the Board's decision as to the representative unit is valid—deprived of the very thing which petitioner insists it was the purpose of Congress to secure and protect. We had thought that whether an order or decree is final is not to be determined by the name which the court or board gives it but should be decided on consideration of its essence, its substance, its intrinsic nature. Or in other words —what is done by it. The decision in question un-

doubtedly operated particularly upon petitioner. It was an adversary party. The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies * * *."

As the court below has recognized, petitioners, by reason of the Board's decision and order certifying a competing and rival union as the exclusive bargaining agency for all longshore employees in a large geographical section of the United States, are effectively eliminated from engaging in their business of representing longshore employees in that district. The order has as effectively deprived petitioners of their status as a collective bargaining representative as if they, themselves, had been ordered to quit doing business on the West Coast. The employers, through an association, have entered into a contract with the CIO unions, giving the CIO members a preferential employment status, and, for all that petitioners have power to prevent, an out and out closed shop contract may likewise be entered into, thereby not only depriving petitioners of their right to engage in business as labor organizations, but, what is worse, also depriving their members of their very livelihood.

The single question in this case is whether the United States Court of Appeals was correct in determining that, although all of the other factors of a final order were present, because the order did not command or direct a particular thing to be done—because it was not made in the language of a command—it is not appealable, and whether the *Shannahan* and *Shields* cases, under which the Court of Appeals felt bound to decide the order was not a final one, did in fact require the lower court to hold as it did.

B. Shannahan and Shields Cases Are Not Determinative.—The court below in holding the order of certification not to be a reviewable order predicated its decision solely upon the holding of this Court in the *Shannahan* and *Shields*

cases. The lower court took the view that these two decisions held that an order of an administrative agency to be reviewable must "be made in the language of a command"—that the "order" besides being definitive, final and binding must "also command or direct a particular thing to be done". It is submitted that the court erred in its interpretation of these two cases. The orders in the *Shannahan* and *Shields* cases were held to be non-reviewable solely because of the fact that the effectiveness of the orders involved depended on some further, future action to be taken by that or another administrative body.

In the *Shannahan* case, the Interstate Commerce Commission had determined upon application of the National Mediation Board that the Chicago, South Shore and South Bend Railroad was not within a *proviso* exempting certain street railways from the Railway Labor Act and that the railroad was subject to the Railway Labor Act. Before any affect or adverse result could obtain from this finding an additional proceeding would have to be instituted by the Mediation Board at sometime in the future. Until that was done no status or right was in any way affected.

In the *Shields* case, which was based solely on the *Shannahan* case, the Interstate Commerce Commission had found that the Utah Idaho Central Railroad Company, like the Chicago, South Shore and South Bend Railroad involved in the *Shannahan* case, was not within the exemption of certain street railways from the Railway Labor Act, and that the Railroad was subject to the Railway Act. The court found that the Commission's determination was binding and final but was not an order which could be appealed for the reasons stated in the *Shannahan* case. In the *Shields* case, however, the Mediation Board pursuant to the Interstate Commerce Commission's findings had ordered the carrier to post a notice that labor disputes would be handled under the Railway Labor Act. Disobedience of this order

was punishable in a criminal suit by the United States Attorney. The court accordingly permitted the petitioner relief under the equity jurisdiction of a District Court. Both of these cases, however, go no further than to state that where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," then it is not a final order reviewable by the Circuit Courts. This is the view of those decisions taken by this Court in the case of *Rochester Telephone Corporation* v. *The United States of America et al.*, 83 L. Ed. (adv. sheets) 719, (see page 722, of the adv. sheets, and note 8).

In the present case, the determination that all longshore employees on the entire West Coast constituted a single appropriate bargaining unit and the order certifying the CIO as the exclusive bargaining agent does not depend for its effectiveness on any future action by the Board in so far as the petitioning unions are concerned. The finding is not one which, as in the *Shannahan* case, merely made complainant amenable to orders of an administrative body in the future. Petitioners' status as longshore employees representative on the West Coast has not only been altered but entirely destroyed. Neither the National Labor Relations Act nor any other Act requires, intends, or even contemplates any further action so far as concerns petitioners. The employers have chosen to regard the order, and, having entered into contracts with the CIO, have finally and conclusively destroyed petitioners' right to represent employees of individual employers. It is hardly to be thought that this Court intended in the *Shannahan* and *Shields* cases to disagree with the opinion of Chief Justice Groner in the decision below when he states that:

> "We had thought that whether an order or decree is final is not to be determined by the name which the Court gives it but should be decided on consideration of its essence, its substance, its intrinsic nature. Or in

other words—what is done by it. The decision in question undoubtedly operated particularly upon petitioner. It was an adversary party. The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies."

Further, it can well be argued that any thought that the *Shannahan* case might regard form rather than substance is removed by the opinion of this Court in the *Rochester Telephone Corporation* case, classifying the *Shannahan* and the *Shields* cases as within that group of negative order cases non-reviewable solely because dependent upon the contingency of future administration action, and overruling the case of *Lehigh Valley Railway Company* v. *U. S.*, 243, U. S. 412, 61 L. Ed. 819, on which the *Shannahan* case depended in no small measure. The *Rochester* case clearly affirms Chief Justice Groner's opinion that the substance rather than the form of an order shall determine its effect as a final and reviewable one. Any possible holding in the *Shannahan* or *Shields* cases which is contrary to this is overruled by the decision of this Court in the *Rochester* case.

C. The Rochester Case is Determinative of the Present Issue.

This Court, in the *Rochester* case decided April 14, 1939, involving an appeal from a finding of the Federal Communications Commission that the Rochester Telephone Corporation was subject to its jurisdiction because it was under the control of an interstate company, re-examined in its entirety the law relating to appealable order of administrative bodies, and rejected the doctrine of "negative orders" as being "as unilluminating and mischief making a distinction as the outmoded line between 'non-feasance' and 'misfeasance' ". After discussing the decisions relating to "negative orders", which this Court divided into three groups, the Court found that there were two fundamental prerequisites to judicial review of orders of administrative

bodies. The first is the primary jurisdiction doctrine which requires that matters which call for technical knowledge pertaining to the particular subject which the administrative body in question was set up to administer must first be passed upon by that body. In the present case all technical matters and all matters peculiarly within the knowledge of the National Labor Relations Board have been first passed upon by that Board. The Appellate Court is not being asked to pass upon any matter of a technical nature requiring specialized knowledge. The second doctrine is that of administrative finality which states that the range of issues upon review must be narrowed to "questions affecting constitutional power, statutory authority and the basic prerequisites of proof". In the present case the review is limited solely to the question of whether the National Labor Relations Board has power under the Act to prescribe a collective bargaining unit larger than the employees of an individual employer.

This Court in the Rochester decision plainly indicated that in the future it will regard the substance rather than the form of the particular order sought to be reviewed and that if as a practical matter property rights were threatened or destroyed, a status was altered, or a right withdrawn, the order would be reviewed no matter in what form it might have been made. In particular this Court held that one test which could be derived from previous cases "is that an order is affirmative if it has the legal affect of changing the *status quo*, permitting what was previously not allowed or compelling what was previously not required." Under this test the order here complained of is certainly a final and reviewable one; for a *status quo* in which petitioners represented thousands of employees of various employers operating on the West Coast and in some instances represented every employee of each and every employer in entire ports, is destroyed by the Board's order certifying a rival union as the exclusive bargaining

agent for all longshore employees on the entire West Coast. The present order "compels what was previously not required" by requiring all employers to deal exclusively with one labor organization, whereas previously each was free to deal with whom it pleased.

If it be argued that the order in the present case is not enforcible by the National Labor Relations Board, it can be stated in reply, first, that this Court expressly held in the *Rochester* case that an order no longer need be enforcible by the administrative body making the order to be reviewable, and second, that the order is in fact enforcible by the Board for the reason that had the employers refused to deal with the CIO union which had been designated by the Board as exclusive bargaining agent, unfair labor practice proceedings could have been commenced against the employers and the employers found to have violated the Act and ordered to cease and desist under penalty of being cited for contempt of court upon application to a Circuit Court. In this connection it should be remembered that a labor organization, unlike an employer, does not have available the remedy of disregarding a determination by the Board and defending against enforcement proceedings on the ground that it was erroneous. If the employer acquiesces the decision is final as to that labor organization. See Matter of *Wallach's, Inc.*, v. *Boland*, 253 App. Div. 371, 373, 2 N. Y. (2d) 179, 191 (1st Dep't 1938, aff'd 277 N. Y. 345, 14 N. E. (2d) 381 (1938). It is fatuous to say that, merely because contempt orders cannot be directed against labor organizations, its rights and status cannot be as effectively interfered with by contempt orders directed against those with whom it is its business to deal.

In the *Rochester* case this Court classified certain formerly non-reviewable "negative orders" into two groups. After discussing the decisions and overruling the *Lehigh*

Valley case [3] typifying one group and the *Procter & Gamble* case [4] typifying the other, the court arrived at the conclusion that a review of such orders might properly now be had. In one group (called group 2 in the decision) are orders which have the effect of placing the complainant either inside or outside of a statute or of statutory command. It can be argued by analogy that the present case belongs within this group. Here the decision has the affect of placing third parties, the employers, with whom petitioners must deal, within reach of the Board's order, and thus placing petitioners within the ambit of Board control.

It can be said with more certainty, however, that the order in the present case comes within the third classification of what were formerly termed "negative orders." This group includes orders refusing to forbid or compelling conduct by third parties. In the present case the order complained of refused to compel certain conduct by third parties, the employers, *i. e.*, refused to prescribe the unit contended by petitioners, the single employer unit, as being the largest unit authorized under the statute, thereby refusing to compel the individual employers to bargain with the representative, the petitioners, chosen by employees in single employer units.

But regardless of whether the present order comes within either of the two classifications of orders now found to be reviewable, it is submitted that the essence of the *Rochester* case, which is that the substance rather than the form of an order complained of shall prevail, is determinative of the present issue. The order of the Board now before this Court, whether it be called "an order," "a decision," "a determination," "a finding," or any other designation, has the actual affect of destroying petitioners' existence on the

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[3] *Lehigh Valley Railroad Company* v. *U. S.*, 243 U. S. 412, 61 L. Ed. 819.

[4] *Procter and Gamble Co.* v. *U. S.*, 225 U. S. 282.

West Coast, and has foreclosed them from representing longshore employees in that large area, adversely affecting petitioners future status, and denying and abridging its privileges and prerogatives. The order is not something which the petitioner "can simply ignore." The decision is finally determinative of petitioners' rights in a large geographical district of the United States. Petitioners have no remedy except to appeal to the Circuit Court of Appeals as a person aggrieved by a final order as prescribed under Section 10(f) of the National Labor Relations Act. The possibility of a resort to a District Court for a determination of the present issues, which are ordinarily exclusively determined by circuit courts and which are usually beyond the experience of district courts, is neither an effective, nor an expeditious, nor a final method of disposing of the issues or of protecting petitioners' rights. Certainly the review contemplated by Congress—in a court of appellate jurisdiction in the first instance—should be permitted.

D. The Present Decision Conflicts With the Decision in the Libbey-Owens-Ford Glass Company Case in the Sixth Circuit.

On the 15th day of May, 1939, the Circuit Court of Appeals for the Sixth Circuit, in a case entitled "Libbey-Owens-Ford Glass Company, petitioners, *vs.* National Labor Relations Board, Respondent," entered an order denying respondent's motion to dismiss for lack of jurisdiction and entertaining petitioner's petition on its merits. That case involved a petition for review of the Board's order in a representation proceeding, conducted under Section 9 of the National Labor Relations Act, and of a designation by the Board of an appropriate bargaining unit. In both the *Libbey-Owens-Ford Glass Company* case and the present case petitioners sought review of representation orders, challenging the statutory authority of the Board under the Act to prescribe the unit in

question and seeking review under 10(f) of the Act. The *Libbey-Owens-Ford Glass Company* case presents even less reason for an appeal then the present case for the reason that there an employer rather than a labor union was the petitioner. Nevertheless the Sixth Circuit took jurisdiction to hear the appeal on its merits. Although the court wrote no opinion, the brief of the respondent contained the same points of law argued by the respondent in the present case, and the brief of the petitioner, Libbey-Owens-Ford Glass Company, relied principally on the decision of the court below in the present case and on the decision of this Court in the *Rochester* case. The decree of the Sixth Circuit permitting review of an order entered in a representation proceeding under Section 9 of the Act and certifying one of two competing unions as exclusive bargaining agent for said unit is directly contrary to the decree of the court below in the present case. It is apparent that a conflict in decisions on an identical matter exists between the Circuit Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the District of Columbia—a conflict which can be resolved only by this Honorable Court.

Conclusion.

It is submitted that the decree herein of the United States Court of Appeals for the District of Columbia is in error and should be reversed, and it is respectfully urged that the court grant the writ of certiorari petitioners seek herein.

Respectfully submitted.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners.

Dated May 25, 1939.

321 Tower Building,
Washington, D. C.